



**Request for Ruling from the
Canadian Environmental
Law Association and Greenpeace**

**Demande de décision de
l'Association canadienne du droit de
l'environnement et Greenpeace**

In the Matter of

À l'égard de

**Ontario Power Generation Inc.,
Pickering Nuclear Generating Station**

**Ontario Power Generation Inc.,
centrale nucléaire de Pickering**

Request for a ten-year renewal of its Nuclear
Power Reactor Operating Licence for the
Pickering Nuclear Generating Station

Demande de renouvellement, pour une période
de dix ans, de son permis d'exploitation d'un
réacteur nucléaire de puissance à la centrale
nucléaire de Pickering

Commission Public Hearing – Part 2

**Audience publique de la Commission –
Partie 2**

June 2018

Juin 2018

Request for Ruling

In the Matter of Ontario Power Generation's (OPG) request to renew the operating licence for the Pickering Nuclear Generating Station (NGS).

June 25, 2018

THE UNDERSIGNED registered oral intervenors hereby request a ruling pursuant to Rule 20(1) of the *Canadian Nuclear Safety Commission Rules of Procedure*, SOR/2000-211 with respect to the closure dates of the reactors at the Pickering Nuclear Generating Station and the Commission's approval of any plans required therein.

WHEREAS the Ontario Power Generation has previously submitted to the Canadian Nuclear Safety Commission that six of the Pickering Nuclear Generating Station reactors will operate until 2022; two would then shut down, and four would run to 2024;¹

WHEREAS we have been unable to find any acknowledgement in Commission transcripts from Part 1 of the hearing or Commission Member Documents (CMD) by OPG and CNSC staff referencing OPG's plan to close the two Pickering reactors in 2022;²

WHEREAS the planned closure of the six reactors at Pickering A in 2022 is also not acknowledged in the current LCH;³

WHEREAS the Preamble of Section 15.4 titled End of Commercial Operations of the draft Licence Conditions Handbook only references a single operation end date of December 31, 2024:

This licence condition also ensures that operation beyond December 31, 2024 would constitute a change in the licensing basis requiring approval by the Commission or a person delegated by the Commission [emphasis added]

AND WHEREAS the Preamble of Section 15.4 titled End of Commercial Operations of the draft Licence Conditions Handbook for the Pickering NGS contemplates that an extension of reactor operation could be authorized by a delegate of the Commission - absent a public hearing process - stating:

¹ OPG Letter, B McGee to MA Leblanc, "Pickering NGS - Notice of Intent to Renew Power Reactor Licence PROL 48.02/2018" [APPENDIX 1]

² See CMD 18-H5; CMD 18-H6.1; CMD 18-H6.1B; CMD 18-H6.1C; CMD 18-H6.B; CMD 18-H6.C; CNSC Transcript "Public hearing - April 4th, 2018"

³ CMD 18-H6, "OPG Licence Renewal Pickering Nuclear Generating Station - Proposed Licence," p 185

This licence condition also ensures that operation beyond December 31, 2024 would constitute a change in the licensing basis requiring approval by the Commission or a person delegated by the Commission [emphasis added]

WHEREAS CNSC Staff’s supplemental submission (18-H6.B, p 24) omits mention of the aforementioned wording allowing delegated staff to approve operations past 2024, stating instead, “As operation of any unit beyond December 31, 2024 would constitute a change to the licensing basis, OPG will be required to seek Commission approval”;⁴

WHEREAS CNSC Staff’s presentation (18-H6.C) also omits mentioning the draft Licence Condition which allows a person delegated by the Commission to approve operations beyond 2024, stating to the contrary, “Commission approval would be required to operate any unit beyond December 31, 2024”;⁵

WE REQUEST THAT given the location of the Pickering NGS and its proximity to millions of people, its operation is a matter of significant public interest requiring the highest levels of transparency and safety to protect human health and the environment. Therefore, an authorization to extend the operating life is not an activity which can be authorized by a person delegated by the Commission;

WE REQUEST THAT this is an authorization which can only be fulfilled by the Commission, personally, by way of public hearing and thereby request Licence Condition 15.4 be amended to read:

The licensee shall maintain and implement plans to end the commercial operations of the two Pickering A units on or before the end of 2022 and the four Pickering B units on or before December 31st 2024.

Submissions in Support of This Request

1. Designated Officers only make ‘lower-risk’ licensing decisions

Section 37(2) of the *Nuclear Safety and Control Act* (NSCA) enumerates the duties which the Commission may authorize a designated officer to perform. Of particular relevance are subsections 37(2)(c) and (d) which permit designated officers to issue, renew, amend, revoke and replace licences on behalf of the Commission. As stated in the NSCA:

Designated officers

37 (1) The Commission may designate, by name, title of office or class of persons, any

⁴ CNSC Staff, “CMD 18-H6.B - A Licence Renewal: Ontario Power Generation Inc. Pickering Nuclear Generating Station”

⁵ CNSC Staff, “CMD 18-H6.C - Pickering Nuclear Generating Station Licence Renewal: CNSC Staff Presentation”

person whom the Commission considers qualified as a designated officer and any officer so designated shall be provided with a certificate setting out the duties that the designated officer is authorized to carry out.

Duties

(2) The Commission may authorize a designated officer to

...

(c) issue, on receipt of an application referred to in subsection 24(2), a licence of a class established by the Commission;

(d) renew, suspend in whole or in part, amend, revoke or replace — or authorize the transfer of — a licence referred to in paragraph (c) on receipt of an application referred to in subsection 24(2);

In interpreting this provision, the CNSC has held that authorizations performed by Designated Officers (DO) are for lower-risk licensing decisions. This is expressly noted in a presentation from CNSC Staff to the Commission from March 2018 in its meeting to discuss the annual report of the designated officer program. As CNSC Staff state:

Pursuant to the NSCA, DOs have the authority to carry out *lower-risk* licensing decision, opportunities to be heard, prescribed equipment and personnel certification and other authorities.⁶

The Commission currently lacks the evidence to confirm the safety of the plant beyond 2024. Therefore, it is not possible to deem this activity lower-risk and within the permissible scope of authorizations which can be delegated to Designated Officers.

2. The Commission must not delegate powers they alone are empowered to make

It is a general rule of administrative law that a tribunal may not delegate its powers to another.⁷ This is based on the Latin maxim *delegatus non potest*, a delegate may not re-delegate.⁸ The maxim is a rule of statutory construction which informs the extent to which an authority vested with statutory discretion can entrust another with its authority.⁹

⁶ CNSC, “CMD 18-M10.A - Status of the Designated Officer Program: 2016” (15 March 2018), online: <http://nuclearsafety.gc.ca/eng/the-commission/meetings/cmd/pdf/CMD18/CMD18-M10A-Presentation-from-CNSC-Staff-on-Status-of-the-DO-Program-2016.pdf> [Status of Designated Officer Program, 2016]

⁷ Sara Blake, *Administrative Law in Canada*, 4th ed (Toronto: LexisNexis, 2006) at 137

⁸ Van Harten, G., Heckman, G. and Mullan, D. J. “Administrative Law: Cases, Text and Materials: 6th Ed” (2012: Emond Montgomery Publications Ltd, Toronto), p 559.

⁹ *Ibid*

As the Commission seeks to delegate the approval of the operation of Pickering NGS beyond 2024 ‘to a person chosen by the Commission,’ the presumption against delegation is engaged. On this basis, we submit that the Commission, as both Canada’s nuclear regulator and a quasi-judicial tribunal, must ensure it retains decision-making as envisioned by the legislature, and exercise this authority within the purposes (s 3) and objects (s 9) of the *NSCA*.

First, the application of *delegatus non potest* limits the extent to which decisions which are *prima facie* intended to be made by the Commission can be delegated to others. While section 37 of the *NSCA* seeks to delegate a breadth of powers - otherwise held by the Commission - to designated officers, unlimited discretion should not be conferred.¹⁰

Secondly, the licence amendment contemplated in LCH 15.4 is not administrative in character, and thus due to the high degree of judgment involved, cannot be delegated.¹¹ By allowing ‘a person delegated by the Commission’ to review a change in licensing basis permitting the Pickering NGS to operate beyond 2024 confers too great a level of discretion and independent decision-making power. This is not the intent of the *NSCA*. The Commission's enabling statute vests the CNSC, as a regulator and quasi-judicial tribunal, with the oversight of Canada’s nuclear industry to prevent unreasonable risk, to the environment and to the health and safety of persons *while* disseminating information to the public, concerning its regulatory actions.

The operation of Pickering NGS beyond 2024 is a matter of significant importance to residents of Ontario, their health and protection of the environment. Shielding this licence change from a public Commission hearing would not only be contrary to administrative principles of delegation, but the purposes and objects of the *NSCA*, and the public interest mandate of the Commission as a quasi-judicial body.

3. The request for ruling does not duplicate interventions

A request for ruling is distinct in procedure and substance from an intervention. While the aforementioned intervenors jointly support and submit this request for ruling to the Commission, we submit it is distinct from our respective interventions for the following reasons.

First, the procedure required for the submission of request for rulings is distinct from interventions. For instance, interventions are submitted and approved pursuant to s 19 of the *Rules*. They require the intervenor have an interest in the matter being heard and provide expertise useful to the Commission in

¹⁰ *Law Society of New Brunswick v. Pelletier*, [1989] NBJ no 34, 59 DLR (4th) 401 (N.B.C.A.); *C.E. Jamieson & Co. (Dominion) Ltd. v. Canada (Attorney General)*, [1987] FCJ no 826, 46 DLR (4th) at 29-33 (T.D.); *Western Canada Wilderness Committee v. British Columbia (Minister of Environment & Parks)*, [1988] BCJ No. 436, 25 BCLR (2d) 93 (S.C.)

¹¹ *Morton v. Canada (Fisheries and Oceans)*, 2015 FC 575 at 80

coming to a decision.¹² Request for rulings, conversely, are intended to assist during a public hearing, and may be made by “a participant...at any time”.¹³

Secondly, requests for rulings are distinct in substance from interventions. While intervenors may provide submissions on areas of concern or expertise, requests for rulings are issue specific and pertain to a matter requiring the Commission’s consideration per section 24(4) of the *NSCA*. As this request for ruling responds to material issues raised by CNSC Staff and the licensee in its supplemental submissions, we submit that the doctrine of *res judicata* does not apply.

4. The request for ruling is not limited to procedural considerations

In its Record of Proceeding for the licence renewal of the Pickering NGS in 2013, the Commission noted that while it chose to consider multiple request for rulings received, request for rulings “normally refer to procedural considerations” and “it could be disputed whether some of the requests fall within such an interpretation.”¹⁴ Based on the CNSC’s past acceptance of rulings which dealt with substantive matters, and an ordinary reading of the CNSC’s *Rules*, we submit requests for rulings are not limited to procedural matters.¹⁵

The *Rules* frame requests for rulings as a “ruling on a particular issue.” Neither the term ‘procedure’ nor ‘procedural’ appear in the text of Rule 20. Thus, to limit requests for rulings to procedural matters would be overly restrictive and contrary to the ordinary meaning of the regulation. The interpretation of statutory provisions properly begins with its ordinary meaning and if the Commission wishes to depart or modify the ordinary meaning, it must provide plausible reasons which are sufficiently justified.¹⁶

In the alternative, if the Commission remains of the view that request for rulings are limited to purely procedural matters, we note the Commission has previously accepted requests substantive in nature and therefore, the present request is not barred from review.¹⁷

¹² *Canadian Nuclear Safety Commission Rules of Procedure*, SOR/2000-211, s 19(1) [**CNSC Rules**]

¹³ *Ibid*, s 20(3)

¹⁴ CNSC, “Record of Proceedings, Including Reasons for Decision: Application to Renew the Nuclear Power Reactor Operating Licence for the Pickering Nuclear Generating Station” (9 August 2013), para 7 [**CNSC Pickering Decision**]

¹⁵ See *CNSC Rules*, *supra* note 12, s 20

¹⁶ Ruth Sullivan, “Sullivan on the Construction of Statutes,” 5th ed (Markham: LexisNexis, 2008), p 24

¹⁷ See for instance: Request for Ruling from CELA to CNSC (August 19, 2015), “File/dossier 6.01.02 – OPG application for 13 year licence renewal at Darlington Nuclear Generating Station”; CNSC Pickering Decision, *supra* note 14; CNSC, “Record of Proceedings, Including Reasons for Decision: Application to Renew the Nuclear Power Reactor Licence for the Darlington Nuclear Generating Station” (2 March 2016), para 210

5. The request for ruling is within the scope of the hearing

This request for ruling is within the scope of this hearing as it is directly related to the activities proposed by the licensee in its licence application. The consideration of human health and the environment is an enumerated purpose of licencing hearings, per section 24(4) of the *NCSA*. It is also a guiding purpose of the Commission, as set out in sections 3 and 9.

Furthermore, there is no parallel or alternative process which allows for the resolution of issues as presented in this request for ruling. We submit that annual regulatory oversight reports are not a stand in for licensing hearings due to their limited disclosure and response opportunities.

6. The request for rulings are not time barred

We submit the request for ruling is not time barred as we have attempted to exhaust other administrative procedures, such as seeking an adjournment of the hearing and seeking disclosure, before commencing these requests for ruling.¹⁸

As a matter of procedure, the Commission has previously accepted request for rulings during Part 2 of the hearing process.¹⁹ Therefore this request is not time barred as it falls within the Commission's previously noted practice. Furthermore, we submit this request prior to the start of the Part 2 hearing to ensure it does not delay or prejudice the hearing process.

All of which is respectfully submitted this 25th day of June, 2018.

CANADIAN ENVIRONMENTAL LAW ASSOCIATION



Theresa McClenaghan
Executive Director and Counsel

¹⁸ Donald JM Brown and The Honourable John M Evans, "Judicial Review of Administrative Action in Canada," Vol 2 (Toronto: Thomson Reuters 2017) at 3 - 61.

¹⁹ See for instance: Request for Ruling from CELA to CNSC (August 19, 2015), "File/dossier 6.01.02 – OPG application for 13 year licence renewal at Darlington Nuclear Generating Station"; CNSC, "Record of Proceedings, Including Reasons for Decision: Application to Renew the Nuclear Power Reactor Operating Licence for the Pickering Nuclear Generating Station" (9 August 2013), para 7; CNSC, "Record of Proceedings, Including Reasons for Decision: Application to Renew the Nuclear Power Reactor Licence for the Darlington Nuclear Generating Station" (2 March 2016), para 210

GREENPEACE

A handwritten signature in black ink, appearing to read "S. Stensil". The signature is written in a cursive style with a large, prominent loop at the end.

Shawn-Patrick Stensil
Senior Energy Analyst

Appendix 1 - Notice of Intent

OPG PROPRIETARY

Attachment 1 (Page 1 of 4) to OPG Letter, B. McGee to M.A. Leblanc, "Pickering NGS – Notice of Intent to Renew Power Reactor Licence PROL 48.02/2018" CD# P-CORR-00531-04712.

Attachment 1

Description of Activities Associated with the Stabilization and Safe Storage of Pickering NGS

Background

Ontario Power Generation (OPG) has been evaluating plans to pursue continued operation of the Pickering Nuclear Generating Station to 2024. Based on the evaluations, six units at Pickering would operate until 2022; two units would then shut down and four units would operate to 2024. It should be noted that OPG's official notification to the CNSC of the final shutdown date of Pickering NGS will be provided no later than June 30, 2017, as required by Licence Condition 16.2 of the "Pickering Power Reactor Operating Licence PROL 48.02/2018". This notification will be the subject of a separate submission. Once the units are shutdown and stabilized, they would be placed into a state of Safe Storage for a period of approximately 30 years to allow for the natural decay of radioactivity.

Following shutdown, the activities at PNGS will involve three distinct phases, as outlined below:

- 2-3 years **Stabilization** period to place units in Safe Storage state. During this phase the reactors will be defueled and dewatered.
- 25-30 years in **Safe Storage** state to allow for natural decay of radioactivity. During this phase fuel will continue to be moved out of the irradiated fuel bays and into dry storage containers. Heavy water will be stored on site.
- 10 years **Dismantling**.
- 5 years **Site Restoration**.

The shutdown and stabilization of the station would be carried out as with a major unit outage, using existing personnel and procedures, wherever possible.

A nominal timeline for the proposed continued operation, shutdown, and safe storage of the PNGS is presented below.

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